IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

City of Charleston, a municipal corporation,	)	
Plaintiff,	)	
v.	)	C.A. # 2:99-8282-23
A Fisherman's Best, Inc., AFB of Charleston Inc., Ivan Miller, and the Fishing Vessel Tri Liner,	)	**ORDER**
Defendants.	)	

This matter is before the court upon the City's motion for summary judgment as to its claims for declaratory judgment regarding the municipal resolution passed on July 21, 1998. The Complaint seeks declaration of the legality of the City resolution passed on July 21, 1998 which provides that pelagic (relating to, or living in ocean waters as opposed to inland or near coastlines) longline fishing vessels shall be prohibited from docking or tying up at the Charleston Maritime Center other than to purchase fuel, ice or in the case of emergency. Further, no billfish or swordfish shall be sold, purchased, processed, or unloaded at the Maritime Center.[1] The

[1] The actual language of the resolution states as follows:

> NOW, THEREFORE, BE IT FURTHER RESOLVED, that use of the Charleston Maritime Center and its appurtenant facilities is hereby prohibited to fishing vessels utilizing pelagic longline tackle, which shall be prohibited from docking or tying up at the Maritime Center and its appurtenant facilities for any purpose other than to purchase fuel or ice or in the case of a storm or other emergency.
>
> NOW, THEREFORE, BE IT FURTHER RESOLVED that any Lessee or user of any part of the Charleston Maritime Center and its appurtenant facilities shall be prohibited from selling, purchasing, processing or unloading any fish from or caught by pelagic longline fishing vessels.

defendants, A Fisherman's Best, Inc. and AFB of Charleston, Inc., are involved in purchasing and selling seafood. The defendant, Ivan Miller, owns the longlining vessel Tri Liner and operated out of Shem Creek in Mt. Pleasant, and intended to operate out of the Charleston Maritime Center.

I. BACKGROUND

The Charleston Maritime Center ("Center") is a waterfront facility owned by the City of Charleston. A plan was developed for the operation of the Center which included leasing it to different entities for use as a fishing and shrimping facility. The Center neighbors a new Aquarium complex. The resolution at issue came about as part of the determinations regarding the leasing of the Center to certain parties. The facilities at the Center include a dock capable of mooring up to thirty fish and shrimp boats, fuel and ice facilities, refrigeration facilities, and a processing area for unloading (landing), packing, and shipping. The City built the Center because it recognized that dock space in the Charleston area was becoming scarce, no single user could afford the costs of infrastructure, the fish and shrimp industry was beneficial to the local economy, and the infrastructure was necessary for the industry to survive.

Longline fishing gets its name from the fact that the line fished is generally two to forty miles long with shorter lines bearing a hook clipped anywhere from fifty to two hundred yards. Generally, the line fished off the coast of South Carolina ranges between two and ten miles long. This type of fishing appears to be unpopular with conservationist groups and recreational fishermen due to numerous factors, including: the over fishing of pelagic fish (tuna, swordfish,

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> NOW, THEREFORE, BE IT FURTHER RESOLVED that no billfish or swordfish from any source of any kind shall be sold, purchased, processed or unloaded at the Charleston Maritime Center and its appurtenant facilities.

marlin, pelagic sharks); high mortality rates of throw-backs and by-catch; and overcapitalization (too many vessels). For these, and many more reasons, the City has chosen to ban these types of fishermen from using the Center. As a result, shrimpers, recreational fishermen, and other types of commercial fishermen will have exclusive use of the Center. Defendants maintain that currently there are three longline fishing vessels ported in Charleston, all at Shem Creek. Since the filing of this suit the Shem Creek facility has been scheduled to close. According to the defendants, approximately twenty-three fishing vessels have traditionally landed fish in Charleston during a particular year.

II. SUMMARY JUDGMENT STANDARD

To grant a motion for summary judgment, this court must find that "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). The judge is not to weigh the evidence, but rather to determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If no material factual disputes remain, then summary judgment should be granted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party bears the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). All evidence should be viewed in the light most favorable to the non-moving party. Perini Corp. v. Perini Constr., Inc., 915 F.2d 121, 123-24 (4th Cir. 1990). "[W]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." Teamsters Joint Council No. 83 v. Centra, Inc., 947 F.2d 115, 119 (4th Cir. 1991). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence

of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. The "obligation of the nonmoving party is 'particularly strong when the nonmoving party bears the burden of proof.'" Hughes v. Bedsole, 48 F.3d 1376, 1381 (4th Cir. 1995)(quoting Pachaly v. City of Lynchburg, 897 F.2d 723, 725 (4th Cir. 1990)). Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual basis." Celotex, 477 U.S. at 327.

III. COMMERCE CLAUSE

The Commerce Clause provides that Congress "shall have Power . . To regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I , § 8, cl. 3. "Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." South-Central Timber Dev. Corp. v. Wunnicke, 467 U.S. 82, 87 (1984) (plurality opinion). "This 'negative'[or dormant] aspect of the Commerce Clause prohibits economic protectionism--that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors . . . . Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273-274 (1988). Even when legislating in areas of legitimate local concern, such as environmental protection and resource conservation, states and municipalities are nonetheless limited by the confines of the Commerce Clause. See Minnesota v. Clover Leaf Creamery, 449 U.S. 715, 727 (1981) (citations omitted).

In order to determine whether a state or municipal activity violates the negative or dormant commerce clause, the court must make two inquiries: First, is the state "regulating" the market at all, or is the state merely "participating" in it. If the City is deemed a market participant as opposed to a market regulator, then the commerce clause restrictions do not apply at all. See Wunnicke, 467 U.S. at 92-95; White v. Massachusetts Council of Constr. Employees, 460 U.S. 204, 108 (1983); Reeves, Inc., v. Stake, 447 U.S. 429, 436-37 (1980); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 808-10 (1976). However, if it is determined that the state activity constitutes "regulation" of interstate commerce, then the court must proceed to a second inquiry: (1) whether the state regulation discriminates against interstate commerce, or (2) whether the state regulation incidentally burdens interstate commerce.

Whether or not the regulation falls into category (1) or (2) determines the legal test to which the regulation is subject. A discriminatory law is subject to a stricter standard. It must serve a legitimate local purpose and there must not be any less discriminatory alternate means to accomplish the same goal. Hughes v. Oklahoma, 441 U.S. 322, 336 (1979). If the law only places an incidental burden on interstate commerce then the defendant must show that the burden is clearly excessive in relation to the putative local benefits. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (balancing test).

A. Market Participation/Market Regulation

Whether or not a governmental entity is acting as a market participant is a very fact-specific determination. While there does not appear to be a clear definition of what constitutes market participation, market regulation lends itself to more precise description. In Reeves, the Court explained that the Commerce Clause responds to "state taxes and regulatory measures

impeding free trade in the national marketplace," and that market regulation originally referred to "home embargoes," "custom duties," and "regulations" excluding imports. 447 U.S. at 436 (citing H.P. Hood & Sons v. DuMond, 336 U.S. 525, 539 (1949)). Another indicator that a state is acting as a regulator is where some criminal penalty or enforcement mechanism forms part of the regulation. See SSC Corp. v. Town of Smithtown, 66 F.3d 502, 512-13 (2nd Cir. 1995). Cases falling within the market participant exception clearly include a State "buying" (Alexandria Scrap), "selling" (Reeves), and "employing" (White). However, there is no basis to conclude that these activities are the exclusive activities falling within the exception. In Wunnicke, the Court further explained that the proper inquiry is whether the state is actually participating in the narrowly defined market as a proprietor rather than simply regulating the actions of other private market participants. 467 U.S. at 94-95; see e.g., Chance Management v. State of South Dakota, 97 F.3d 1107, 1113 (8th Cir. 1996) (state-owned lottery system acted as proprietor when imposing residency requirements for licensing of operators).

The first case in which the Supreme Court attempted to define the parameters of the market participant exception was Hughes v. Alexandria Scrap, where Maryland had instituted a program designed to remove abandoned automobiles from the State's roadways and junkyards. Basically, to further this purpose Maryland offered a "bounty" (in effect a subsidy) for every Maryland-titled junk car converted into scrap. However, an amendment to the program imposed more detailed documentation requirements on out-of-state than in-state processors, therefore making its less profitable for suppliers to transfer the vehicles outside Maryland. Plaintiff was a Virginia junk processor. In the Court's view, Alexandria Scrap did not involve "the kind of action with which the Commerce Clause is concerned." 426 U.S. at 805. The Court

characterized the State's role as: "Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price," id. at 806, "as a purchaser, in effect, of a potential article of interstate commerce," and has restricted "its trade to its own citizens or businesses within the State." Id. at 808. "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." Id. at 810. This example appears to be among the outermost factual situations to fall within the market participant exception.

In Reeves v. Stake, a case which falls more clearly into the exception, the State of South Dakota ran a cement plant which for years provided cement to in-state residents and out-of-state buyers. Due to a cement shortage, the State announced a new policy that it would sell first to in-state residents with the remainder going to out-of-state residents or businesses. Finding support in Alexandria Scrap, the Court held that South Dakota's actions with regard to whom it would sell cement were within the market participant exception. 447 U.S. at 440. In an attempt to define the parameters of the exception, the Court noted acts of buying and selling as means of participating in the market, and explained that "'[l]ike private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.'" Id. at 439n.12 (quoting Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940)). It is that right "to determine those with whom it will deal"that most neatly fits the case at bar.

In South-Central Timber Dev. Corp. v. Wunnicke, Alaska was not acting as a market participant when it proposed to sell a large quantity of state timber on the condition that the

buyer/manufacturer process the timber within the state prior to export. The Court held that "although the State may be a participant in the timber market, it is using its leverage in that market to exert a regulatory effect in the processing market, in which it is not a participant." 467 U.S. at 98. Inasmuch as Alaska retained no proprietary interest in the timber after the time of sale, the State could not be considered a participant in the downstream processing market.

Finally, in White v. Massachusetts Council of Constr. Employees, the Court held that the City of Boston was a participant in the labor market, and thus was not "regulating" commerce in violation of the Commerce Clause by requiring all city-funded construction projects to be performed by a work force of at least fifty percent Boston residents. 460 U.S. at 214-15. This requirement forced all city building contractors to hire half of their work force from Boston. As a purchaser of construction services, Boston was participating in the construction labor market. While Justice Blackmun dissented from the majority's conclusion that Boston acted as a market participant, his explanation of the right to "refuse to deal" reveals a distinction that is helpful in this context:

> [t]he simple unilateral refusals to deal the Court encountered in Reeves and Alexandria Scrap were relatively pure examples of a seller's or purchaser's simply choosing its bargaining partners, 'long recognized' as the right of traders in our free enterprise system. The executive order in this case, in notable contrast, by its terms is a direct attempt to govern private economic relationships. The power to dictate to another those with whom *he* may deal is viewed with suspicion and closely limited in the context of purely private economic relations.

Id. at 1050 (Blackmun, J. dissenting) (footnote omitted) (emphasis in original). This distinction, while not directly applicable to the facts of this case, is helpful to visualize the possible limits of this right to deal or refuse to deal. In this case, the City has simply chosen not to deal with the

longliners, thereby leaving the Center for the exclusive use of shrimpers and other fishermen.

The only case that supports the defendants' position that a city's provision of an opportunity to lease space in which to process and land fish for market is Smith v. Department of Agr. of Ga., 630 F.2d 1081 (5th Cir. 1980). In Smith, the State of Georgia owned and leased its farmers' market to produce farmers. The best located produce booths were assigned first to in-state sellers, then to out-of-state sellers on a first-come-first-serve basis. The court held that this preference was a regulation, and rejected the State's argument that it acted as a participant in the provision of services– the service of providing a space for the sale of produce, and instead held that the State was regulating the produce market. This type of activity–providing a space (either through booth rentals or the lease of the facilities) for use by certain parties– appears identical to the activity challenged here. Nevertheless, the regulation at issue in Smith facially discriminated against out-of-state produce vendors favoring in-state produce vendors, and as such is distinguishable. Although the court concluded that the State acted as a market regulator, it did not analyze the State's role in the market, but based its conclusion that providing a space was in fact regulation on citation to Alexandria Scrap and Reeves for the proposition that this king of activity had been distinguished from their holdings. Id. at 1083. The language relied upon in Alexandria Scrap and Reeves did not address the market participant/regulator role, but instead addressed the weight of the burden on interstate commerce (which is a different determination altogether). See Alexandria Scrap, 426 U.S. at 805-806. In addition, Smith was rejected by the Eighth Circuit in Four T's Inc. v. Little Rock Airport Comm, 108 F.3d 909 (8th Cir. 1997). The court in Four T's adopted the dissent's position in Smith that "'the state had entered into the economic market for the provision of physical marketplaces,' and as such, was

acting in its proprietary role as 'a participant in the market for marketplace space. It . . [was] selling a service rather than a good.'" Id. at 912-13. The Defendants argue that like in Smith, the City is not selling or buying fish, but is regulating the area of fish. However, its resolution does not regulate fish, but only the use of the Center.

The City argues that it wholly owns the Center, and is a participant in the real estate market by making decisions with regard to whom it will lease the property. Nowhere does the City prohibit longliners from landing their catch anywhere else in the City or from operating in the waters off of the coast. Prohibiting longliners from using the Center does not in any way regulate the longliners' business or manner in which they conduct their business. As such, this court concurs with the Eighth Circuit in Four T's and believes that as a lessor of its property, the City is participating in the economic marketplace for the provision of physical marketplaces. Therefore, the restrictions of the dormant Commerce Clause are inapplicable to the City's actions as a market participant.

B. Discrimination Against Interstate Commerce

Even if the City's resolution is deemed market regulation, the resolution does not discriminate in any way against interstate commerce. Discrimination in this context means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Pike, 397 U.S. 137, 142 (1970). The City has not favored any in-state entity over an out-of-state entity. Nothing in the resolution references or restricts any activity or classifies any person based on their residence or state of origin. The defendants argue that the resolution bans the import of pelagic fish into Charleston, and thus it discriminates. The resolution does not, as the defendants argue, ban the importation of pelagic fish in Charleston

or anywhere else in the State, but only restricts who can use the Maritime Center and restricts what kinds of fish may be landed there. There are other landing docks, McClellanville, Cherry Point, and Georgetown, at which longliners, including the defendants, may land their fish. This is not the kind of discrimination contemplated by the Commerce Clause.

C. Incidental Burden on Interstate Commerce

If however, the challenging party cannot show the resolution is discriminatory, then it must demonstrate that the resolution places an incidental burden on interstate commerce that "is clearly excessive in relation to the putative benefits." Clover Leaf Creamery Co., 449 U.S. at 471 (quoting Pike, 397 U.S. at 142). First, there must be at least an incidental burden on interstate commerce. Incidental burdens are "the burdens on interstate commerce which exceed the burdens on intrastate commerce. . . Thus, the minimum showing required to succeed in a Commerce Clause challenge to a state regulation is that it have a disparate impact on interstate commerce. The mere fact that it may otherwise affect commerce in not sufficient." Automated Salvage Transport, Inc., v. Wheelabrator, 155 F.3d 59, 75 (2nd Cir. 1998) (quoting USA Recycling v. Town of Babylon, 66 F.3d 1282, 1287 (2nd Cir. 1995); see also Pacific Northwest Venison Producers v. Smitch, 20 F.3d 1008, 1015 (9th Cir. 1994) (explaining that "incidental burdens" on interstate commerce include disruption of interstate travel and shipping due to lack of uniformity in state laws, impacts on commerce beyond the borders of the state, or burdens that fall more heavily on out-of-state interests).

In Pacific Northwest Venison Producers v. Smith (PNVC), the court held that a statewide ban on the importation, sale, holding, transfer or release of certain deleterious exotic wildlife, including mouflon sheep, fallow deer, sika deer and elk did not incidentally burden interstate

commerce. 20 F.3d at 1015. The PNVC was unable to present any evidence to establish the effect on interstate commerce. Id. In Clover Leaf Creamery, the Court held that the State's ban of nonrecyclable milk containers did not have even an incidental effect on interstate commerce. While the ban would cause some market disruption, "there is no reason to suspect that the gainers will be Minnesota firms, and the losers the out-of-state firms." 449 U.S. at 473.

The burden imposed by the City's ban of pelagic fish landing at the Center is relatively minor, if existent at all. While the prohibition of landing these types of fish at the Center may put pressure on the other landing facilities on the South Carolina coast, nothing reveals any effect outside of the State. Defendants argue that the effect of the resolution is essentially to ban the importation of pelagic fish through the port of Charleston because the port "is the only deep water safe harbor within a hundred miles with facilities for unloading pelagic fish." (Def.'s Ex. 3). (There are small unloading facilities in Georgetown, McClellanville, and Cherry Point (near Rockville)). They assert that due to their difficulty landing their catch, the price will rise and put them at a disadvantage versus their out-of-state competitors. This turns their argument into discrimination against in-state commerce, not discrimination against out-of-state commerce. This is not the type of "protectionism" the Commerce Clause was intended to remedy. If the ban of all import, sale, or possession of certain game in the entire state of Washington does not have an incidental effect on interstate commerce, then the failure to give longliners a landing pier for their fish in the Charleston Harbor can hardly be seen to have an incidental effect on interstate commerce.

Even reaching the Pike v. Bruce Church balancing test to determine the constitutionality of an incidental burden on interstate commerce, the resolution does not impose a clearly

excessive burden on commerce in relation to the putative local benefits. "Putative" as a descriptor of local benefits is very important in this analysis because of the necessity that the court refrain from judging the merits of the legislative justifications. The principle that a challenger cannot prevail so long as "it is evident that from all the considerations presented to [the legislature], and those which we may take by judicial notice, that the question is at least debatable" has become to be incorporated into the Commerce Clause analysis. See Clover Leaf Creamery, 449 U.S. at 724, 729 (referencing incorporation of principles from Equal Protection jurisprudence); CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 92 (1987). Coupled with this principle is the rule that a legislature need not strike at all evils at the same time and in the same way. Clover Leaf Creamery, 449 U.S. at 725.

Defendants rely upon Louisiana Seafood Mgt. Council v. Foster, 917 F.Supp. 439 (D. La. 1996), in which a fish-related regulation was struck down as a violation of the dormant commerce clause (the court issued a preliminary injunction on the basis the challengers would prevail on the merits). The challenged regulation prohibited commercial fishing for certain fish on the weekends. The court labeled the incidental effects as the "deprivation of finfish that would have been harvested but for the restriction against weekend fishing,"and held that there was an incidental burden on interstate commerce because "commerce is being deprived of the finfish, and byproducts, which would be captured and transported in interstate commerce." Id. at 445. The court considered and rejected the two purported justifications: conservation and the prevention of a clash between commercial and recreational fishermen. Conservation could not be served by only excluding commercial fishermen, leaving the weekends open to recreational fishermen. And, the court found that the State had failed to present any evidence of an actual

conflict between the two classes of fishermen. In failing to consider the term "putative" and its implications in this context, the court placed too much emphasis on the City's presentation of proof.

The City has offered numerous benefits and reasons for passage of the resolution at issue. The following is an abbreviated version of the list of those reasons taken from the City's memorandum in support of summary judgment:

> 1. Establishing and preserving an eco-tourist friendly environment of the Aquarium-Maritime Center.
> 2. Preserving a City image dedicated to conservation of the environment, both historical and natural.
> 3. Encouraging economic growth of shrimping activities and recreational fishing.
> 4. Minimizing the possibility of confrontations between recreational anglers and longliners.
> 5. Discouraging increased fishing pressure on pelagic fish.
> 6. Avoiding City funds from being used to capitalize longliner operations when those operations are either detrimental to certain fishes or are perceived by the public as being not environmentally sound and where evidence suggest that the industry is already over capitalized.
> 7. Attracting sports fishermen to Charleston who sympathize with cause.
> 8. Promoting ecology.
> 9. Promoting historical fisheries which are consistent with Charleston's image.
> 10. Attempting to increase the local price of swordfish to discourage consumption of same in local restaurants.
> 11. Supporting Save our Swordfish campaign.
> 12. Supporting position of local taxpayers.
> 13. Making space for shrimping vessels for which facility was principally designed.

Clearly, at least a majority of the above justifications are arguable. While it may be contested as to whether banning longliners from the Center will have any direct effect on the population of the pelagic fish off the coastline, it is debatable that disallowing them from the

Center may well prevent an increase in the number of longliners already fishing off the coast. In response to the City's argument that the longliners' landings at the Center could have a negative impact on the public/eco-tourist perception of the adjacent Aquarium, the Defendants contend that the longliners will already be at the Center– for ice, fuel, and in the case of an emergency–and thus the prohibition is arbitrary. One can well perceive a difference between a longliner stocking up on ice and fuel and that of longliners using the facility to unload and process their catch. The burden placed on longliners by the resolution is not clearly excessive to the putative local benefits.

IV. PREEMPTION

The defendants also contend that the City's resolution is preempted by the Magnuson Fishery Conservation and Management Act of 1976, codified at 16 U.S.C. §1801-1883, which regulates the fishing industry. The Act established the Exclusive Economic Zone ("EEZ") in the waters off the U.S. coastline running from the outer limits of state territorial waters to 200 miles seaward. Id. § 1811. All fish except highly migratory species are subject to the exclusive fishery management authority of the United States. In addition, the Act established eight regional fishery management councils and provides that management within each region shall be conducted pursuant to fishery management plans prepared by each council for each species of stock fish within the region. Id. § 1852. States continue to regulate fishing out to the seaward limit of state territorial waters. The following relevant portions of the state law savings clause in the Act have fueled and confused the preemption debate:

> (1) Except as provided in subsection (b) of this section, nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries.

> . . .
> (3) A State may regulate a fishing vessel outside the boundaries of the State in the following circumstances:
> (A) The fishing vessel is registered under the law of that State, and (i) there is no fishery management plan or other applicable Federal fishing regulations for the fishery in which the vessel is operating; or (ii) the State's laws and regulations are consistent with the fishery management plan and applicable Federal fishing regulations for the fishery in which the vessel is operating.
>
> (b) Exception
>
> (1) If the Secretary finds, after notice and an opportunity for a hearing in accordance with section 554 of Title 5, that--
> (A) the fishing in a fishery, which is covered by a fishery management plan implemented under this chapter, is engaged in predominately within the exclusive economic zone and beyond such zone; and
> (B) any State has taken any action, or omitted to take any action, the results of which will *substantially and adversely affect the carrying out of such fishery management plan*; the Secretary shall promptly notify such State and the appropriate Council of such finding and of his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan.

16 U.S.C.A. § 1856 (West 1985 & Supp. 1999).

Few courts have been faced with the question of preemption by the Magnuson Act. The Eleventh Circuit considered the preemption issue in Southeastern Fisheries Assoc. Inc. v. Chiles, 979 F.2d 1504 (11th Cir. 1992), where it held that the Act probably preempted Florida regulations that limited the number of pounds of Spanish Mackerel that a commercial vessel can bring into the State port on any given date. By characterizing the scope of the Act as the regulation of "fishery management activities in the EEZ," the court focuses the relevance of the Act in the case at bar. The Chiles court also concluded that, due to the legislative history of the Act and the preceding federal regulation, the meaning of subsection (1) of the above savings clause was intended only to preserve the State's autonomy over its territorial waters (up to 3

miles out), and was not to include any part of the EEZ. Id. at 1508 n.4. In State of Rhode Island v. Sterling, 448 A.2d 785 (R.I. 1982), the court there held that the Act preempted the state's imposition of flounder possession and landing limits where the Act did not impose any limits. These cases all deal with limits for fish of a certain type in the state.

The focus on fisheries in the EEZ has also led other courts to conclude that not all regulation touching the fishing industry is preempted by the Act. See, e.g. Louisiana Seafood Mgt. Council v. Foster, 917 F.Supp. 439, 444 (D. La. 1996) (no preemption where regulation regulated fishing activity and possession of finfish only in state territorial waters); Raffield v. State, 565 So.2d 704 (Fla. 1990) (no preemption where state statute only prohibited possession of finfish captured with gill net within the state's territorial waters and land); People v. Weeren, 607 P.2d 1279 (Cal. 1980) (upholding statute which prohibited the taking of swordfish with the assistance of a spotter aircraft in the EEZ where state facilities were to be used for the landing and processing and prohibition furthered federal interest of conservation).

The City argues that the resolution only bans longliners from landing their catch at one location– the City Maritime Center, and has no effect on the EEZ or where the longliners choose to land their fish elsewhere, and as such is not preempted because it does not significantly and adversely affect the fisheries off of South Carolina. By framing the issue narrowly, defendants maintain that there is no conflict between the resolution and federal law or regulation, as no federal regulation requires that private citizens or government entities assist in the unloading of pelagic species or other fish. The City concedes that it has no right to limit the number of fish caught or landed in South Carolina, and has not attempted to do so.

In contrast, the defendants contend that the resolution "effectively places a zero limit on

the number of fish that may be caught by longliners off the coast of South Carolina." In support of that conclusion, defendants rely on the alleged intent of the resolution to prevent longline fishing vessels from operating off the coast of South Carolina in the EEZ. However, the jump in logic from the prohibition of longliners at the City Maritime Center to the total ban on longliners in the entire State of South Carolina is untenable. The longliners are not prohibited from landing their catch anywhere else except the Maritime Center. Despite assertions to the contrary, longliners continue to fish off the coast of South Carolina and continue to land their catch in South Carolina. They just use other landing spots.

While it is undisputed that there is a federal management plan in effect in the EEZ off the S.C. coast, the City resolution does not regulate fisheries within the EEZ. It does not place any limits by number or poundage on a catch; it does not by its nature even reach the EEZ in any way except that those longliners fishing there cannot rely on the Maritime Center as a place to land their fish. Therefore, the defendants fail to raise any material issues of fact with regard to preemption.

V. EQUAL PROTECTION

Where the classification propounded by the statute does not implicate a suspect classification or a fundamental right, the test to be applied is that of mere rationality. City of Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432 (1985); New York City Transit Authority v. Beazer, 440 U.S. 568 (1979); New Orleans v. Dukes, 427 U.S. 297 (1976); Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955). The degree of deference afforded under this standard of review is great. "[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect

fundamental rights nor proceed along suspect lines; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." Dukes, 427 U.S. at 303-04 (citations omitted). The statutory classification "need not be drawn so as to fit with precision the legitimate purposes animating it." Alexandria Scrap, 426 U.S. at 813. Moreover, the challenger must attack every conceivable basis for the regulation. See FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993). The attacking party has the burden of proving the classification is so attenuated to its asserted purpose that the distinction it draws is wholly arbitrary and irrational. City of Cleburne, 473 U.S. at 446. As was similar with regard to the Commerce Clause analysis, and will be similar to the Due Process analysis, with this deference comes two important considerations: (1) that any conceivable local purpose if reasonably related will suffice, in other words, the actual purpose need not support the regulation, and (2) legislative action may be "one step at a time," meaning it may be underinclusive.

The defendants concede that the rational basis test applies, but argue that the City has failed to produce any evidence supporting the legitimate interests. They claim that the resolution does not affect the conservation of resources, and in fact, by promoting recreational fishermen, increases pressure on the resource. Defendants contend that there is no proof that longlining operations will affect the Aquarium, no proof that there is any confrontation between recreational fishermen and longliners, no proof that shrimp boats will be displaced, no proof that there is an ecological, environmental, or conservation benefit from the resolution. The defendants err in putting the City to proof of the reasonableness of the resolution. The burden of proof is on the defendants. The City did not have to actually rely on any of the putative ends.

In addition, the defendants rely on Louisiana Seafood Mgt. Council v. Foster, 917 F.Supp. 439 (E.D. La. 1996) (issuing a preliminary injunction). The only issue in Louisiana Seafood analyzed on equal protection grounds concerned the classification that rod & reel commercial fisherman must have acquired a gill net license in two of the past three years to be eligible for a commercial rod & reel license that year. Id. at 446. In the past the R&R fisherman had no need to purchase a gill net license because they were not gill net fishermen and had no need for the license. The court held that this classification in the statute was either a mistake or a completely arbitrary classification and struck it down.

Foster is not analogous to the case at bar. The City has submitted numerous reasons for excluding the longliners, all of which are listed infra. While the defendants attack the City's proof of reasonableness, the link between the putative reasons and the resolution is not arbitrary or irrational. At the very least, the resolution would prevent an increase in longliners fishing off the South Carolina coast. While it may be debatable whether or not the longliners contribute to the majority of the depletion of the pelagic fish, there appears to be a greater mortality rate among their throw-backs than that which occurs from recreational fisherman and shrimpers. While the recreational fishermen may also contribute to the depletion of the fish, and while the resolution may result in an increased presence of recreational fishermen which would in turn increase pressure on the fish, legislation may act one step at a time. Underinclusiveness is not necessarily an indicator of arbitrariness.

VI. DUE PROCESS

Defendants also argue that the resolution violates the Due Process Clause of the Fourteenth Amendment. It has long been recognized that when reviewing economic and social

legislation, the court's only role is to assure that there is some rational relationship between the means and ends of the state regulation. See, e.g., Lee Optical, 348 U.S. at 488 (regulation of visual care). In Nebbia v. People of the State of New York, 291 U.S. 502 (1934), the Supreme Court ushered in the mandate for substantial judicial deference when considering constitutional challenges to economic and social regulation. When, as here, there is no implication of a fundamental right, due process only protects against the unreasonable, arbitrary or capricious law or regulation. As summarized by the Court so long ago in Nebbia:

> [t]he Fourteenth [Amendment does] not prohibit governmental regulation for the public welfare. [It] merely condition[s] the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.

Id. at 525.

Defendants rely upon a South Carolina case which struck down, on Due Process grounds (both federal and state), a local ordinance that prohibited the operation of B-B-Q stands (the definition of which actually included all restaurants, lunch rooms, or sandwich shops) after 11 p.m. within the vicinity of a residential area (where residential area was defined as two or more homes) in an attempt to argue there is a higher standard for those laws "regulating lawful business enterprise" than for those "enacted to protect the public health." Fincher v. City of Union, 196 S.E. 1 (S.C. 1938). However, there is no such standard in federal jurisprudence, and application of that case is unwarranted. The City in this case has not passed an ordinance regulating Defendants' business operations. It has regulated its own property.

Just as analyzed under the Equal Protection clause, the prohibition of longliners from the

Center bears a rational relationship to the putative local benefits submitted by the City. It is not necessary for government to remedy all evils consistently or at the same time.

VII. STATE LAW GROUND– POLICE POWER/HOME RULE ACT

The final ground on which the Defendants seek to challenge the City's motion for summary judgment falls under state law.[2] The defendants contend that the resolution is procedurally defective, and in violation of the police powers under which local government practices. To first dispose of the police power argument, the court incorporates the constitutional analyses to conclude that as a reasonable local governmental decision, the resolution at issue is not in violation of the inherent police power of the City.

With respect to the procedural issue, the Home Rule Act, S.C. Code Ann §§ 5-7-10 to -310 (Law. Co-op. Supp. 1998), sets forth the powers of and procedures for local government. The grant of power to cities is to be construed liberally, see id. § 5-7-10, and has also received broad judicial interpretation see Hospitality Ass'n of S.C., Inc. v. County of Charleston, 464 S.E.2d 113 (S.C. 1995). First, the defendants contend that the procedural method in which the resolution at issue was passed by City Council was flawed. By arguing that the resolution should have been subject to two readings, as opposed to the one reading it received, the defendants imply that the action taken by the City to prohibit the longliners from the Center required the passage of an ordinance. Section 5-7-270 of the Act requires that all ordinances have two readings. While City Council must pass an ordinance to actually "sell or lease or contract to sell or lease" its own land, id. § 5-7-260 (6), there is no such requirement to prohibit certain persons

[2] The defendants couched this claim in terms of procedural due process and state law, but the court will address it as a state law issue.

from using City property. Therefore a resolution will suffice.

As further support for the City's authority under state law to determine with whom it will do business, section 5-7-40 gives cities the power to own, sell, lease or otherwise dispose of property. In addition to statutory power to exercise dominion over municipal property, cities, like any other proprietor, are afforded considerable discretion in the exercise of this power. See Barnhill v. City of North Myrtle Beach, 511 S.E.2d 861 (S.C. 1999) (restricting the use of its beaches for the launching of motorized watercraft); Captain Sandy's Tours v. Georgetown Cty., 323 S.E.2d 99 (S.C. 1992) (restricting the use of its boat landing for commercial purposes). Defendants have failed to raise any material issues of fact which would sustain this action on the basis of state law grounds.

VIII. CONCLUSION

It is, therefore,

ORDERED, for the foregoing reasons that Plaintiff's motion for summary judgment is **GRANTED**, and it is, therefore, **ORDERED** that the resolution passed by the City of Charleston on July 21, 1998, is not violative of the U.S. Constitution or the laws of the State of South Carolina as presented to this Court,

AND IT IS SO ORDERED.

PATRICK MICHAEL DUFFY
UNITED STATES DISTRICT JUDGE

Charleston, South Carolina
June___, 1999